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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	Chapter 11
	:	
LEHMAN BROTHERS HOLDINGS INC., <i>et al.</i> ,	:	Case No. 08-13555 (JMP)
	:	
Debtors.	:	(Jointly Administered)
-----	X	

**DECLARATION OF GEORGE A. ZIMMERMAN IN SUPPORT OF MOTION OF DR.
H.C. TSCHIRA BETEILIGUNGS GMBH & CO. KG AND
KLAUS TSCHIRA STIFTUNG GGMBH TO WITHDRAW CLAIM NUMBERS 32395
AND 22671 PURSUANT TO RULE 3006 OF THE FEDERAL RULES OF BANKRUPTCY
PROCEDURE**

I, George A. Zimmerman, being fully sworn, hereby declare, under penalty of perjury,
that the following is true to the best of my knowledge, information, and belief:

1. I am an attorney admitted to practice before this Court and a member of Skadden,
Arps, Slate, Meagher & Flom LLP, attorneys for Dr. H.C. Tschira Beteiligungs GmbH & Co. KG
("KG") and Klaus Tschira Stiftung gGmbH ("KTS") and together with KG, the "Tschira Entities")
in the above-referenced chapter 11 cases. Unless otherwise indicated, I have knowledge of the
facts set forth herein.

2. I submit this declaration in support of the Motion of Dr. H.C. Tschira Beteiligungs GmbH & Co. KG and Klaus Tschira Stiftung gGmbH to Withdraw Claim Numbers 32395 and 22671 pursuant to Rule 3006 of the Federal Rules of Bankruptcy Procedure (the "Motion").

3. A true and correct copy of the transcript of the June 13, 2013 Hearing in this matter (pages 1 – 37 of the transcript) is attached hereto as Exhibit 1.

Dated: July 26, 2013
New York, New York

/s/ George A. Zimmerman
George A. Zimmerman

Exhibit 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555 (JMP)

4 Adv. Case No. 09-01062

5 - - - - - x

6 In the Matter of:

7 LEHMAN BROTHERS HOLDINGS INC., ET AL.,

8 Debtors.

9 - - - - - x

10 TURNBERRY CENTRA SUB, LLC, et al.,

11 Plaintiffs,

12 v.

13 LEHMAN BROTHERS HOLDINGS, INC., et al,

14 Defendants.

15 - - - - - x

16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, New York

19

20 June 13, 2013

21 10:04 AM

22

23 B E F O R E :

24 HON JAMES M. PECK

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Objection to Claim No. 62723 of Banesco
2 Holdings CA [ECF No. 37327]

3
4 Hearing re: Four Hundred Second Omnibus Objection to Claims
5 32395 and 22671 (No Liability Derivatives Claims) [ECF No.
6 36006]

7
8 Hearing re: Turnberry Centra Sub, LLC, et al. v. Lehman
9 Brothers Holdings Inc., et al. [Adversary Case No. 09-
10 01062]. Motion to Dismiss.

11
12 Hearing re: Motion by Lehman Brothers Holdings Inc. and
13 Lehman Commercial Paper Inc. For an Order (i) Determining
14 that the LCPI Settlement was entered into in Good Faith
15 Pursuant to California Code of Civil Procedure paragraphs
16 877 and 877.6, and, Based on Such Good Faith Finding and for
17 Other Reasons, (ii) Disallowing and Expunging Proofs of
18 Claim Number 28845 and 28846 [ECF No. 36163]

19
20 Hearing re: Debtors' Ninety-Seventh Omnibus Objection to
21 Claims (Insufficient Documentation) [ECF No. 14492]

22
23 Hearing re: Debtors' One Hundred Twenty-Fifth Omnibus
24 Objection to Claims (Insufficient Documentation) [ECF No.
25 16079]

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Hearing re: Debtors' One Hundred Thirty-Eighth Omnibus
Objection to Claims (No Liability Derivatives Claims) [ECF
No. 16865]

Hearing re: Debtors' One Hundred Ninety-First Omnibus
Objection to Claims (Valued Derivative Claims) [ECF No.
19888]

Hearing re: Three Hundred Twenty-Eighth Omnibus Objection
to Claims (No Liability Claims) [ECF No. 29323]

Hearing re: Three Hundred Sixtieth Omnibus Objection to
Claims (Valued Derivative Claims) [ECF No. 31316]

Hearing re: Three Hundred Ninetieth Omnibus Objection to
Claims (Valued Derivative Claims) [ECF No. 34044]

Hearing re: Three Hundred Ninety-Fourth Omnibus Objection
to Claims (Valued Derivative Claims) [ECF No. 34728]

Hearing re: Three Hundred Ninety-Eighth Omnibus Objection
to Claims (No Liability Derivatives Claims) [ECF No. 34732]

Hearing re: Four Hundred Twelfth Omnibus Objection to

1 Claims (Duplicative Claims) [ECF No. 37166]

2 Hearing re: Debtors' Objection to Proof of Claim No. 66099

3 Filed by Syncora Guarantee, Inc. [ECF No. 20087]

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5 Hearing re: Plan Administrator's Omnibus Objection to

6 Claims Filed by Deborah E. Focht [ECF No. 34303]

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8 Hearing re: Objection to CMBS Claims and Request for

9 Subordination Pursuant to Sections 510(a)-(c) of the

10 Bankruptcy Code [ECF No. 36882]

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12 Hearing re: Merits Hearing With Respect to Proofs of Claim

13 Number 57069 and 45833

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25 Transcribed by: Nicole Yawn, Jamie Gallagher, Pamela Skaw

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Be seated, please. Good morning.

4 MS. MARCUS: Good morning, Your Honor. Jacqueline
5 Marcus, Weil, Gotshal & Manges, on behalf of Lehman Brothers
6 Holdings, Inc. and its affiliates.

7 The first matter on the agenda this morning,
8 Your Honor, is an uncontested matter. It pertains to the
9 objection to claim number 62723 of Banesco Holdings.

10 Lehman filed an objection to the claim of Banesco
11 and, since that time, has been engaged in discussions with
12 Banesco, and we've agreed to partially resolve the
13 objection. So we have a form of revised order that Banesco
14 has approved, and it basically provides for the expungement
15 of one of the claims filed by Banesco and adjournment of the
16 hearing with respect to the other claim.

17 If I may, Your Honor, I have a blackline copy of
18 the order?

19 THE COURT: You can hand that up.

20 Thanks.

21 MS. MARCUS: And Ms. Dye is here on behalf of
22 Banesco, and I think she's going to confirm that we've
23 reached an agreement on the form of the order.

24 THE COURT: You're so far away that, even if you
25 say you're in agreement, it won't be picked up by our

1 recording equipment.

2 MS. DYE: So I can come up to the podium?

3 THE COURT: I think you're going to have to come
4 up and speak into a microphone, and please also identify
5 yourself for the record.

6 MS. DYE: My name's Bonnie Dye. I'm from
7 Chadbourne & Parke, and we represent Banesco Holdings, and
8 we agree with the proposed order as handed up to you this
9 morning, Your Honor.

10 THE COURT: Thank you.

11 If I could just ask what's going to happen with
12 regard to the portion of this objection that's being
13 deferred to August 15th?

14 MS. MARCUS: My understanding is that the parties
15 are continuing to discuss resolution of the claim.

16 UNIDENTIFIED SPEAKER: That's correct.

17 MS. MARCUS: So hopefully, there will be no need
18 to have a hearing, but I just can't assure the Court about
19 that.

20 THE COURT: Understood, and, just for clarity --
21 I'm looking at the words in the blackline -- the response
22 deadline is August 15, and the matter is adjourned 'til
23 August 29.

24 MS. MARCUS: That's correct.

25 THE COURT: Okay. That's fine.

1 MS. MARCUS: Thank you, Your Honor.

2 Switching to the contested portion of the
3 calendar, Your Honor, the next matter, number two, will be
4 handled by Jay Tambe of Jones Day.

5 MR. TAMBE: Good morning, Your Honor. Jay Tambe
6 and Locke McMurray, from Jones Day, for debtor Lehman
7 Brothers Holdings, Inc.

8 This is LBHI's objection to claims number 32395
9 and 22671. To the extent that any of the discussion rolls
10 over to a discussion of the LBHI, LBF Lehman Switzerland
11 settlement, I would defer to Mr. Perez from the Weil firm,
12 because I know he's intimately familiar, as is Your Honor,
13 with that settlement.

14 This hearing, Your Honor, is a legal sufficiency
15 hearing. It is the basis of our objection that there is no
16 legal basis for the claim that has been submitted in these
17 two claims, 32395 and 22671.

18 Fundamentally, what you have here are a series of
19 derivatives contracts that were governed by the master
20 agreements. Those contracts each contain automatic early
21 termination provisions so that, as soon as LBHI filed the
22 bankruptcy, each of those derivatives transactions was
23 terminated on September 15th, 2008. There's no dispute as
24 to any of those issues. What you have in these claims are
25 valuations that have been submitted not as of the early

1 termination date, but as of a much later date, October 16th,
2 2008.

3 THE COURT: What would be the difference in
4 valuation if the valuation had been done as of September 15,
5 2008 as opposed to the October date?

6 MR. TAMBE: The claimants have not submitted any
7 valuation as of that date. The debtors position is, as of
8 that date, based on the value of SAP stock, which is the
9 underlying, they, in fact, would have been a receivable to
10 LBF, and therefore, no claim with respect to Lehman Brothers
11 Holdings, Inc.

12 THE COURT: Okay.

13 MR. TAMBE: If I could briefly go into the
14 argument, Your Honor?

15 THE COURT: Sure.

16 MR. TAMBE: We have a small hearing binder with
17 just a couple of exhibits that I might want to draw your
18 attention to. If I could hand those up, please?

19 THE COURT: You may.

20 (Pause)

21 MR. TAMBE: Your Honor, the following issues are
22 uncontested. As I said, the early termination date is not
23 contested. The fact that it was an automatic early
24 termination is uncontested. It's uncontested that the
25 agreement required, in the first instance, for the

1 calculation of the termination amount to be done as of the
2 early termination date, and it's uncontested that, under
3 section 562, September 15th, 2008 is the date on which the
4 contract should be valued, absent certain circumstances, and
5 the issue really is is there a basis to value these
6 contracts on a date other than September 15th, 2008.

7 Namely, is there a basis to value as of October 16th?

8 If I could draw your attention, Your Honor, to Tab
9 7 in the binder I just handed up. Now, what Tab 7 is is a
10 stock price chart of SAP stock, and I've highlighted on that
11 stock price chart certain key events. You have
12 September 15th, 2008, the early termination date. You have
13 October 16th, 2008, which is the date as of which these
14 contracts were valued, and you've got December 1, 2008,
15 which is the date on which the valuation was actually done.

16 So you have a situation here where there is a
17 look-back valuation being done, and there's nothing wrong
18 with that. We don't take issue with that.

19 However, the look-back doesn't look back to
20 September 15th, 2008. The look-back only looks back to
21 October 16th. Looking at the stock price chart, I could
22 speculate as to why that date was picked. As you could
23 tell, there's a sharp dropoff in the SAP stock price from
24 mid-September to mid-October, and, while it's a complicated
25 set of derivatives transactions, quite simply, as the stock

1 price of SAP went down, Lehman was out of the money. All
2 right? The stock price of SAP was high. Lehman was in the
3 money.

4 Now, the rationale that's given for why when the
5 calculation was done in December -- it was done as of 10/16
6 as opposed to 9/15 is that well, it was only on 10/16/2008
7 that the claimants were told that they would not be getting
8 back certain collateral that had been posted with Lehman.
9 The calculation that was done on December 1, 2008 was done
10 on the basis of there being no return of collateral.

11 On December 1, they could just as easily have done
12 exactly the same type of calculation on the basis of no
13 return of collateral, but used the SAP stock price from
14 September 15th, 2008 as opposed to October 16th, 2008. No
15 reason why they couldn't have used that stock price.
16 There's no reason why they have to do it as of October 16th,
17 2008, and the fact of the matter is it's not like they
18 entered into a replacement transaction on any particular
19 date. This was a look-back valuation exercise.

20 The contract told them to do it as of 9/15. 562
21 of the bankruptcy code told them to do it as of 9/15. They
22 chose to do it as of 10/16.

23 THE COURT: Well, doesn't that get us into the
24 question of whether or not there is a justification to pick
25 a different date on account of the uncertainties surrounding

1 the return of the collateral held by LBIE?

2 MR. TAMBE: We would expect no, Your Honor,
3 because what they knew on December 1 when they did the
4 valuation is they would not be getting the collateral back.
5 That uncertainty that existed had been resolved by then.
6 Now, the simple question is now that that uncertainty has
7 been resolved, when do you apply that set of facts now to
8 the relevant values.

9 THE COURT: I understand.

10 MR. TAMBE: Now, --

11 THE COURT: But it's their position.

12 MR. TAMBE: It's their position.

13 THE COURT: It's their position that there is some
14 justification for picking the 10/16 date, and --

15 MR. TAMBE: And --

16 THE COURT: -- you take the position that there is
17 no justification for any date other than September 15?

18 MR. TAMBE: Absolutely. I mean, if their
19 rationale is the reason it's 10/16 is because that's when
20 they learned they wouldn't be getting collateral back -- and
21 that's the only justification they've offered -- that's not
22 a reason for them not to calculate this as of 9/15. Because
23 the test, again, is could they have calculated value, and
24 this was, in all instances, a look-back calculation. Sure,
25 they could have calculated the value, because the

1 calculation was done, not on 9/15, not on 10/16. It was
2 done in December.

3 There's a further point that we've made in the
4 papers, and you don't have to reach it, but, if you need to
5 reach it, you could, and that has to do with whether it's
6 appropriate in any event to consider the posting of
7 collateral or whether collateral's available to be posted as
8 a matter of English law when you're doing this valuation,
9 and we've said that there's clear precedent from the Court
10 of Appeals in it (sic) that says under the 1992 master
11 agreement, when you do a valuation calculation, you do it on
12 the basis that all conditions precedent have been satisfied.
13 You assume that the collateral has been posted. You assume
14 that all those conditions are satisfied. You do it on a
15 value-clean basis.

16 So, even if you looked at the analysis from that
17 perspective and got to that level -- I don't think you need
18 to -- as a matter of English law, you'd have to calculate it
19 on 9/15, and this issue that they raised about the
20 availability of collateral would, in fact, be irrelevant.

21 THE COURT: You're mentioning this law, and let me
22 just throw out a law school question that you probably have
23 the answer to. There is a proceeding in Switzerland. I
24 don't know all of the proceedings that are going on there,
25 but I've read about them, and I'm sure I'll hear about them

1 from counsel for the claimant.

2 Do you know whether or not that proceeding in
3 Switzerland is applying principles of English law that
4 govern the transaction documents or applying Swiss law with
5 reference to the insolvency proceeding of LBF? That's
6 question one, and question two is do you know if it is
7 permissible in the Swiss proceeding for the Swiss court to
8 consider the application of section 562 under our law,
9 because, as I'm understanding this, we have the law of at
10 least three jurisdictions that are implicated here.

11 We have a Swiss proceeding, which deals with the
12 main claim. We have the U.S. bankruptcy proceeding, which
13 deals with the guarantee claim, and we have a choice of
14 governing substantive law, being the law of England and
15 Wales. Do I have that right?

16 MR. TAMBE: That's right, Your Honor. Let me
17 maybe start with the second question first.

18 It is my understanding that the Swiss tribunal,
19 the Swiss court that's hearing the various Swiss
20 proceedings, will not, in fact, apply 562. The 562 argument
21 is one that's raised by LBHI as a U.S. debtor --

22 THE COURT: Yes.

23 MR. TAMBE: -- in this forum. The claim against
24 LBHI as guarantor is not present in the Swiss proceedings at
25 all.

1 THE COURT: Okay. So, if we get to the essence of
2 today's argument, which we actually haven't reached yet, it
3 is the request by the claimant that this proceeding be
4 stayed or deferred for six months in order to defer to the
5 Swiss tribunal, which you oppose, and one of the reasons
6 that you oppose it, I take it, is that we're able here to
7 apply section 562 principles and, based upon the movement of
8 the stock, make what amounts to a summary judgment
9 determination that this claimant has no claim.

10 MR. TAMBE: That's right, Your Honor, and you can
11 make that determination as a threshold matter simply on the
12 basis that they have valued their claim as of the wrong
13 date. The claim that has been submitted is valued
14 incorrectly, because it was valued as of the wrong date.

15 THE COURT: Well, it's valued as of a date that,
16 under 562 language, you could argue is a permissible date
17 for valuation and that they would argue is not a permissible
18 date for valuation because of the collateral issue, which
19 you say is irrelevant.

20 MR. TAMBE: That's right. We would say, under
21 562, the permissible, the only permissible valuation date is
22 September 15th, 2008, unless they carry the burden of
23 demonstrating that there were no commercially-reasonable
24 determinates (sic) of value of that date, which they have
25 not done.

1 THE COURT: Okay. Let's continue with the
2 argument.

3 MR. TAMBE: If I could turn to the stay argument,
4 we start with the premise that they claim that judicial
5 efficiency and avoidance of duplication should militate
6 (sic) this Court (sic) in staying its hand. What we have
7 before the Court is a fully developed legal argument on 562
8 and the correct date for valuing the termination values.
9 It's our position no further submissions are needed on this.

10 Contrast that with what's going on in Switzerland,
11 where the proceedings have just gotten underway. Tab 1 of
12 the binder I handed up, Your Honor, has some of the relevant
13 dates in it. The first four dates deal with the
14 termination, but starting with March 15th, 2033, that's when
15 we filed the omnibus objection objecting to these claims in
16 their entirety. March 25th, the claimants began the first
17 of multiple proceedings in Switzerland, and this was a
18 declaratory action against Lehman Switzerland in Zurich
19 District Court, so not only the bankruptcy proceeding, but
20 an ancillary or collateral proceeding in the Swiss courts
21 against LBF, not against LBHI.

22 Meanwhile, in this Court, we filed a more detailed
23 omnibus objection. It was about a week after that that the
24 claimants first challenged Lehman Switzerland's zero
25 valuation of their claim in the LBF Swiss insolvency

1 proceeding and then, more recently, less than a month ago,
2 they started yet another proceeding, and what they have done
3 there is object to the LBHI, LBF settlement.

4 So, to the extent they are complaining about
5 duplicative proceedings, they have started the duplicative
6 proceedings. I mean, they are multiplying the proceedings
7 in Switzerland and saying aha, now we've got multiple
8 proceedings. You've got to stay your hand here, Judge, even
9 though this is the only forum in which claims against LBHI
10 and LBHI's ability to invoke the protections of the
11 bankruptcy court are relevant. Those issues aren't being
12 addressed anywhere else.

13 The standard against which any stay should be
14 measured -- and this comes from the Supreme Court decision
15 in Colorado River Water Conservation District. The Court
16 has an unflagging obligation to exercise the jurisdiction
17 given to it and should stay a proceeding only under
18 exceptional circumstances, and we would submit, Your Honor,
19 they have not made out a case for exceptional circumstances.

20 THE COURT: I agree.

21 MR. TAMBE: Then I think I'll stop then with that
22 part of my argument here. Happy to answer any questions the
23 Court might have, and I'll respond to whatever Mr. Zimmerman
24 has to say.

25 THE COURT: I'll hear what Mr. Zimmerman has to

1 say, but what he has to do is change my mind.

2 MR. ZIMMERMAN: Good morning, Your Honor. George
3 Zimmerman, representing KTS and Dr. Tschira, the claimants,
4 with my colleagues, Max Polonsky and Julie Cohen.

5 Let me change the entire order of my argument and
6 address and answer, from our perspective, the questions you
7 raised, because I think, frankly, you raised all the right
8 questions. First, in the Swiss proceedings -- strike. The
9 ISDA agreement, the underlying ISDA agreement is governed by
10 English law. Nobody disputes that. In the Swiss
11 proceedings, the substantive rights of the parties under the
12 ISDA agreement will be determined by English law. In the
13 Swiss proceedings, the claimants have submitted a very
14 detailed evidentiary submission, about a hundred pages of
15 law and facts, evidentiary facts to take into account all
16 the factors that English law would look at to determine
17 whether there was a reasonable determinant of value on
18 September 15th, as Lehman says, or October 16th.

19 In those papers, the claimants also indicated --
20 because LBF obviously is going to get a chance to respond --
21 that they will be submitting an expert affidavit on English
22 law, precisely because the English law will be applied.
23 There is two issues about this return of collateral issue.
24 The reason -- and Lehman says that's irrelevant under
25 section 562. Here's why it's relevant both under English

1 law, which governs the ISDA and under section 562.

2 The English law affidavit will say, in sum and
3 substance, that, under English law, the reason there is
4 flexibility, albeit limited, to value either as of the early
5 termination date, or, if it's not reasonably practicable,
6 the earliest date thereafter as is -- the reason for that
7 flexibility is, under English law, to give the non-
8 defaulting party the opportunity to get, to try literally to
9 negotiate and get into and enter into an exact appropriate
10 replacement transaction, and, in fact, the claimants here
11 did -- whenever there's an early termination, a non-
12 defaulting party -- and you know this because you've been
13 involved with this -- can decide right away I don't want to
14 enter into a replacement transaction, and they can get a
15 quote, and you can argue about the quotes.

16 Other times, claimants do try to enter into
17 replacement transaction. That's what happened here.
18 Claimants led to three market makers with expertise. This
19 is a very exotic, complicated slope (sic). It's very large.
20 There was very little market for it, and so, they went to
21 what they thought were the three primary experts in this
22 that could enter into transaction, and, because -- and this
23 is undisputed -- because there were discussions between the
24 claimants and Lehman entities -- and we can debate which
25 Lehman entities -- that led us to believe that the

1 collateral would be released quickly, --

2 THE COURT: That was LBIE, wasn't it?

3 MR. ZIMMERMAN: No. Okay, let me -- two answers
4 to that. First, the submission in Switzerland says that
5 also included LBF, and they have the names of the LBF people
6 who are on the list, but, more to the point, the master
7 custody agreement that governs the placement of the shares
8 was a tripartite agreement, the claimants, LBIE, and LBF --
9 LBIE was just the custodian.

10 The 59 million shares of collateral were
11 specifically for the benefit of LBF, which is defined as the
12 chargee, and, under the terms of the March agreement -- and
13 I'll get you this in a minute. We can hand it up. LBF
14 determines when to release the collateral. LBIE has to get
15 instructions from LBF.

16 So the notion that they have -- and this is one of
17 the dangers of asking for a ruling with no evidentiary
18 record where the evidentiary record is being developed in
19 another proceeding. So, as a practical matter, it's LBF to
20 whom LBHI is the guarantor who made the determination who
21 first said, you know, we'll release it in short time and
22 then, on October 16th, said you're not going to get it, and
23 the reason that's important is because the English affidavit
24 will also say that the valuation date, because the
25 flexibility I talked about was designed to enable the party

1 to literally try to enter into replacement, an exact
2 replacement transaction, which here would be a
3 collateralized transaction -- as, under English law, it's
4 only at the time you learn that you cannot enter that
5 duplicate transaction. That is the date that's the
6 valuation date. That's why October 16th was picked, because
7 that -- it's undisputed that's when the claimants learned
8 from LBF and LBIE that the collateral wouldn't be
9 forthcoming, and that's why October 16th was selected.

10 So, with respect, when Lehman gets up here and
11 says I can speculate based on share prices why October 16th
12 was picked, that's not what the record reflects in
13 Switzerland. The record reflects that that's English law.
14 That's when we found out the collateral was not going to be
15 released.

16 THE COURT: But let me ask you a very fundamental
17 threshold question. At least for me, it's a threshold
18 question.

19 MR. ZIMMERMAN: Yes.

20 THE COURT: Notwithstanding the fact that we are
21 dealing with documents that are governed by English law,
22 there is a law of the case in this bankruptcy estate that I
23 apply safe harbor principles, regardless of the underlying
24 law that governs the ISDA contract, and am I not, under
25 section 562, making judgments that do not speak to the

1 question of governing law as to the underlying safe harbor
2 qualified financial contract, but rather dealing with
3 principles of U.S. law that govern such questions? The law
4 governing commercially-reasonable determinants of value does
5 not speak to as provided by certain English law governed
6 documents. It rather is an open-ended question, and I
7 believe I have the discretion -- respond to this please --
8 to completely ignore applicable English law, to completely
9 ignore what an expert on English law would say, and to
10 completely ignore properly, under principles of comity, what
11 a Swiss court might say because the Swiss court is applying
12 different standards. What do you say to that?

13 MR. ZIMMERMAN: I say the following. Section 562
14 actually -- and we agree with -- 562 is not going to be an
15 issue in Switzerland, and, even if it was, you're going to
16 decide 562, not a Swiss proceeding. We get that.

17 562 has two concepts, and it has a legislative
18 history. The legislative history, which is 2005 W. law,
19 832198, specifically talks about the section 910, which is
20 the section that was added to talk about the valuation date,
21 and what it says, as you well-know, is it's the date of
22 early termination, except if there are no commercially-
23 reasonable determinants of value as of such date. Damages
24 are to be measured as of the earliest subsequent date or
25 dates in which there are commercially-reasonable

1 determinants, which you just cited.

2 The legislative history goes on to say -- it talks
3 about the factors that one would consider in determining
4 commercial reasonableness, because that, by definition, is a
5 mixed question of law and fact, and then, it says, quote,
6 "The references to commercially-reasonable are intended to
7 reflect existing state law standards relating to a
8 creditor's actions in determining damages," close quote.

9 We say -- and I don't think it's in dispute --
10 that the relevant state law standards that govern the
11 creditor's rights under the ISDA agreement here is England.
12 So, even if -- not even if. If the day comes -- because
13 let's play it out. Let's be candid. Let me be candid.

14 If the claimants lose in Switzerland, you're never
15 going to see us again, obviously. There's no guarantee
16 issue, but, assuming for the moment that they're prevailing,
17 when we come back to you and there are no guarantee
18 defenses, because they basically -- it's an unconditional
19 guarantee, and Lehman waived all defenses, other than, I
20 believe, statute of limitations and payment. So forget
21 that.

22 Your issue, Judge, will be the 562 issue. Now,
23 you can do one of two things. You can conclude that I'm
24 reading the legislative history wrong, or that you disagree
25 that 562 was intended on this particular point -- they're

1 specifically talking about commercially-reasonable valuation
2 dates -- was intended to incorporate or look to the
3 applicable state law. Even if you -- either you'll agree
4 with --

5 THE COURT: Even if I do what the Supreme Court
6 and the Second Circuit does all the time, which is
7 effectively disregard legislative history, --

8 MR. ZIMMERMAN: Fair enough. If you disregard the
9 legislative history, Justice Scalia, two issues. I think
10 even Justice Scalia only disregards if it, on its face,
11 contradicts or renders meaningless the plain words of the
12 statute, and I don't think the statute, as you correctly
13 pointed out, speaks to that issue. So I don't think it
14 would be appropriate to -- but, even if you do, then what
15 you are being asked to do is today, based on 25 pages of
16 briefing, conclude as a matter of law with no facts, no
17 testing of factual assertions by either party in their
18 pleadings because these are lawyers --

19 THE COURT: By the way, I'm not going to do that.
20 I'm not deciding that today. So, in the same way that I
21 summarily agreed --

22 MR. ZIMMERMAN: Okay.

23 THE COURT: -- with Mr. Tambe, I'm agreeing with
24 you. It's not happening today.

25 MR. ZIMMERMAN: Let me close --

1 THE COURT: So does that make it easier for you?

2 MR. ZIMMERMAN: Well, it certainly makes some of
3 it easier, yes.

4 THE COURT: Right.

5 MR. ZIMMERMAN: But let me then go to my final
6 point, at least for the moment. I never say final point.
7 I'll think of something else, but let me go to the next
8 point.

9 What made a path, if I can suggest it, might
10 actually satisfy some of Lehman's issues. As I said, the
11 status of the Swiss proceedings is the claimants put in the
12 substantive evidentiary brief. They will, at the
13 appropriate time, put in an expert affidavit on a number of
14 things, including English law.

15 I think Lehman pointed out in their papers
16 correctly that there is some dispute in Switzerland about
17 the amount of bond that has to be posted. We are not
18 counsel in the Swiss proceedings, but I've been advised of
19 what I'm about to tell you by the client.

20 The bond issue has been fully briefed. I think it
21 was fully briefed as of last week or the week before. So
22 the judge is going to make that decision.

23 Once that decision is made, LBF Lehman Switzerland
24 has 90 days to file their papers, and thereafter, claimants
25 have 60 days to file their reply. So that's a little more

1 than six months, but that's what it is, and, at that point
2 in time, it's fully briefed, the judge then decides what he
3 or she wants to do, whether he's going to rule on the
4 papers, whether he wants more briefing, whether he wants
5 discovery, whatever, or whether he wants the parties to
6 consider settling. That's kind of the timeframe, and that's
7 the best I can give you. I can't predict anything beyond,
8 and you're correct.

9 We're not asking for perpetual estate, because I'm
10 not in a position to represent to you when a definitive
11 resolution is going to be. So I get that, but the factors
12 on determining stays, which obviously is discretionary when
13 it comes to international issues -- we cited the Royal Sun
14 Alliance case, which -- and the language they cited has to
15 do with the issue of whether we were asking you to dismiss
16 because of the Swiss proceedings, and that's when the
17 unflagging obligation of courts to exercise jurisdiction
18 comes in. We're not asking for that.

19 We're asking for a six-months date. If you look
20 at the back of the Sun Alliance case, they cite -- they
21 specifically remand to the district court to consider -- you
22 may consider it, district court, whether it's appropriate to
23 stay. They cite four circuit court of opinions, Eleven,
24 Second, and two Seventh Circuit opinions that stayed in
25 favor of pending foreign proceedings, temporarily, including

1 an Eleventh Circuit case that actually stayed -- its Turner
2 Entertainment against Degeto -- that stayed pending, I
3 think, Bermuda actions, notwithstanding the Court mentioned
4 that the Bermuda actions had barely had any progress
5 whatsoever.

6 So what I would respectfully suggest is this. I
7 agree with Lehman that, at some point, if the claimants are
8 successful in Switzerland, we will get to the 562 issue.
9 Since that is inevitable, what you might think about is
10 whether the issue of 562, whether it should consider English
11 law or ignore, whether on these, what I would call a naked
12 record, 562, as a matter of law allows you to make a
13 determination as to whether this was, quote, "commercially-
14 reasonable" or not.

15 If you think briefing on those legal issues would
16 advance the ball since, if we end up before you, you could
17 get that head-start, that's something where I think you
18 could be comfortable that, while there may be a six-month
19 stay, it's not like nothing's going to be going on here, and
20 you can actually -- and the parties and the Court can
21 actually, depending on how the process goes and what the
22 decision ultimately is, may foster progress, but I don't
23 think -- and I took comfort by the fact that you're not
24 going to decide that today. I do think a six-month stay and
25 then coming back to you and telling you where the parties

1 are in six months -- and then, you could do whatever you
2 think is appropriate. It makes some sense.

3 THE COURT: Well, I agreed with Mr. Tambe earlier
4 when the issue was was I going to stay this, and I agreed
5 with him that I was not going to. You're effectively
6 proposing something that amounts to a modified stay, but let
7 me tell you how I view this, and I'd like to get your
8 reactions.

9 I view what's going on in Switzerland as not
10 directly relevant to the claim resolution process in this
11 Court, although you've pointed out that, if you are
12 unsuccessful in the case against LBF in Switzerland, claims
13 here go away. If you are successful, the 562 issue can
14 effectively be revisited then with reference to the
15 guarantee claim. It's also possible that we can flip that
16 on its head and that I can deal preemptively with the
17 guarantee issue, under section 552, determine that you're
18 either right or wrong with respect to the existence of
19 commercially-reasonable determinants of value as of
20 October 16 or as of September 15, as argued by the debtor,
21 and you can either win or lose here.

22 If you lose here, that doesn't preclude your
23 ability to argue against LBF that my decision here was
24 predicated upon applicable bankruptcy law that isn't extant
25 for their purposes. So I'm turning this argument right back

1 at you.

2 Why should this proceeding be stayed a moment when
3 I can deal with these issues independently? Why should I
4 stay these proceedings for a moment when the claims asserted
5 here are, as I understand it, so large that they actually
6 have a significant impact on reserves and distribution
7 rights of other creditors? I'm not waiting.

8 MR. ZIMMERMAN: I understand that, and I'm never
9 the one to ask questions when I'm standing at this side of
10 the podium, but I'm not sure --

11 THE COURT: I reserve the right not to answer any
12 question that you ask.

13 (Laughter)

14 MR. ZIMMERMAN: I can't do that -- well, I can do
15 that, but then I'm in trouble. Because I'm not sure -- yes,
16 you're flipping it, but I'm not sure that doesn't get, if
17 I'm understanding you correctly, Judge, to the same place as
18 my modified plan, which is this. If you are envisioning,
19 hopefully, because we haven't really -- certainly, since we
20 were moving to stay, I hope you understand we didn't fully
21 proof all the merits, because that would be self-defeating.

22 There is a lot to brief on the 562 issue. The
23 legal issues -- I assume you're not having a trial on the
24 factual issues, but the legal issues, whatever they may be,
25 whatever Lehman thinks they are, whatever the claimants

1 think they are -- if that's what you have in mind, I think
2 your idea is fine and more eloquently stated than my
3 modified proposal, because it was intended -- my proposal
4 was intended -- you're right. If you conclude, heaven
5 forbid, that we're wrong on 562, then that doesn't -- if
6 it's a legal analysis, it doesn't interfere or preclude the
7 claimants from getting whatever they can get in Switzerland.
8 It just makes sure you never have to see us again. And so,
9 assuming we have the opportunity to fully brief all the
10 legal issues and we're not going to have a full-blown trial
11 as to the facts, that is kind of what I was maybe suggesting
12 as an alternative path, and if -- full stop.

13 THE COURT: Let me hear what Mr. Perez has to say,
14 because he's standing up, even though Weil is not counsel
15 for these purposes. So I'm going to presumably hear
16 something about --

17 MR. PEREZ: Switzerland.

18 THE COURT: -- the LBF proceeding in Switzerland.

19 MR. PEREZ: Yes, Your Honor. Just very quickly.

20 As the Court recalled, we were here before the Court on a
21 motion to approve a 9019, which was approved. That 9019 had
22 several conditions preceding. It has a drop-dead date of
23 September 30th.

24 We have worked through almost all -- there's one
25 minor condition precedent that we're still working on --

1 involves obtaining approval in another estate, and it was
2 based on two things happening in the Swiss proceeding. One
3 was the co-location plan, which is where the claims were
4 allowed or disallowed. There were approximately 151 claims
5 that were treated in the co-location plan that were
6 guaranteed and probably another 20 claims that were treated
7 in the co-location plan that were not -- that didn't have
8 guaranteed claims here. Of those, approximately 15 filed
9 objections, Tschira being one, and that's proceeding.

10 In addition to that, Your Honor, there is what's
11 called the realization plan, and, in essence, the
12 realization plan is the settlement between LBHI and LBF.
13 What Tschira has, in essence, done in Switzerland -- the
14 only party out of the 171 creditors is object and request an
15 order from FINRA asking to have an appealable order so that
16 they can, in essence, run out the clock and not allow us to
17 conclude the settlement.

18 I mean, my interest is first and foremost in
19 making sure that we don't lose because people run out the
20 clock, and there is -- universally, everybody believed that
21 the settlement was a win/win for both parties, and it's
22 obviously a litigation tactic, kind of the best defense is a
23 good offense, in order to object being the single party
24 objecting to the realization plan in order to, in essence,
25 either have the deal go away after four years of trying to

1 get it done or, alternatively, negotiate something on behalf
2 of their client.

3 So I just wanted to put that into context,
4 Your Honor, because you can't -- this is part of a whole
5 picture, and I think that's a very important part. Thank
6 you.

7 THE COURT: Thank you for that.

8 MR. TAMBE: If I may, Your Honor, just briefly, a
9 couple of points? It seems to me where we are now is Your
10 Honor is not prepared to rule today on the application of
11 562, but I would submit that everything that the Court needs
12 to decide that issue is really -- comes out of their papers.
13 It's already in the record.

14 THE COURT: Well, I'm not so sure that's true, and
15 I'll give you a chance to complete your argument, but I
16 believe there is a question as to what is meant by the
17 language commercially-reasonable determinants of value in a
18 setting that is as exotic as this. This is probably
19 something that no congressman thought about. To the extent
20 there is any relevant congressional history on this section,
21 I doubt that anybody was really thinking about the cross-
22 border aspects of section 562 application, and, if such
23 considerations were, in fact, made, this is complicated by
24 the fact that we have three bodies of applicable law
25 potentially to look at and a proceeding, which as Mr. Perez

1 has explained, involves billions of dollars for the benefit
2 of the LBHI estate, billions of dollars in claims
3 represented by LBF that go away upon the effectiveness of
4 the settlement and issues being raised by an entity that, as
5 I understand it, is a foundation with a charitable purpose.
6 So I assume that, from their perspective, they don't
7 necessarily want to put themselves in the middle of this
8 vice, but they're doing that, presumably because they're
9 trying to get some value.

10 It is obvious from your chart that there is a
11 material difference in outcome based purely upon market
12 movements, depending on whether valuation is performed on
13 September 15, 2008 or October 16, 2008. What a difference a
14 month makes, but I still need a record to determine whether
15 as of September 15 there were commercially-reasonable
16 determinants of value. I'm unbiased on this subject, but I
17 believe that, generally speaking, it is a heavy burden for
18 the claimant to show that there were no commercially-
19 reasonable determinants of value on that date or any other
20 date, and I happen to believe that that language deals with
21 markets that are so thoroughly broken that it is not
22 possible as to the underlying asset to come up with a fair
23 valuation.

24 Here -- and this is a major obstacle for the
25 claimant -- the underlying assets are marketable securities

1 where you can readily determine market value, and there was
2 a market for these securities on September 15, 2008. On
3 that basis alone, I might be able to rule in your favor, but
4 this is a very important subject, and it's one that I
5 believe requires more than just a superficial assessment.

6 Claimant needs an opportunity to make an argument
7 why October 16 is right. It may involve the use of experts.
8 Lehman may require experts as well. I am not going to delay
9 on this. I do not view this as a derivative of the Swiss
10 proceedings. I view this as an independent claim matter to
11 be resolved expediently with a briefing schedule to be
12 determined by the parties, including such discovery -- and
13 it should be truly targeted -- that may be needed to address
14 what I view as a very narrow question.

15 With that, I suggest that you meet, confer, and
16 develop an appropriate schedule that takes into account the
17 truly relevant issues, which I view as being very
18 interesting and significant but not terribly fact-intensive,
19 and, as Mr. Zimmerman has requested, he would like an
20 opportunity to submit some further briefing on the subject,
21 and he'll have that right, as will you.

22 MR. TAMBE: That's fine, Your Honor, and we're
23 happy to confer with them on a briefing schedule. I would
24 just like to sort of set a parameter so we don't go off and
25 get a six-month briefing and discovery schedule.

1 THE COURT: No, we are not going to allow this
2 proceeding to extend beyond the break-up date for the LBF
3 settlement. This is going to happen on a very accelerated
4 schedule. This matter is not going to be held in abeyance
5 while the claimant postures in Europe to gain financial
6 advantage.

7 MR. TAMBE: I'll confer with Mr. Perez. We'll
8 come up with a schedule, with that being said, Your Honor.

9 THE COURT: Consider this on a rocket docket.

10 MR. TAMBE: I'll see if they'll sign, Your Honor.
11 Thank you, Your Honor.

12 MR. ZIMMERMAN: Thank you.

13 MR. PEREZ: Thank you. May I be excused?

14 THE COURT: Yes.

15 (Pause)

16 MS. MARCUS: Your Honor, the next matter on the
17 agenda is in the adversary proceeding Turnberry Centra Sub,
18 LLC v. Lehman Brothers Holdings, Inc. and a motion to
19 dismiss. It will be handled by my colleague, Ed McCarthy.

20 (Pause)

21 MR. MCCARTHY: Your Honor, Ed McCarthy, here with
22 Jacqueline Marcus and Loren Alexander (ph) and also a
23 company representative, Christie Zull (ph). We're here on
24 our clients Lehman Brothers Holding, Inc. and Lehman Bank
25 FSB motion to dismiss count three for promissory estoppel of